

**PNOC GUIDELINES AND PROCEDURES FOR
JOINT VENTURES AND LEASE AGREEMENTS WITH
THE PRIVATE SECTOR
FOR PURELY COMMERCIAL ARRANGEMENTS**

WHEREAS, Section 20, Article II of the 1987 Constitution “recognizes the indispensable role of the private sector xxx”;

WHEREAS, Public-Private Partnership (PPP) is a developmental strategy aimed at achieving better quality of life for Filipinos and serving the public good whereby resources are exchanged between and gains realized by government and private partners (PP). Joint ventures (JV) and leases are recognized PPP modalities;

WHEREAS, pursuant to Sec. 4 of Republic Act No. 11966, otherwise known as the Public-Private Partnership (PPP) Code of the Philippines, joint venture agreements and leases involving purely commercial arrangements that neither provide nor include public infrastructure or development services are specifically excluded from its coverage, and PNOC may, therefore, issue its own guidelines and procedures therefor;

WHEREAS, joint ventures and leases for purely commercial purposes are therefore excluded from review and/or approval by the National Economic Development Authority (NEDA) Board, its Investment Coordinating Council (NEDA ICC) and the Public Private Partnership Center of the Philippines (PPP Center);

WHEREAS, the PNOC is the government agency mandated to promote the development and utilization of energy sources to ensure the country’s self-sufficiency in energy, foster allied activities of national interest for sustained economic growth and for better quality of life; and

WHEREAS, PNOC hereby issues these guidelines and procedures in entering into JVs and leases with PPs for purely commercial arrangements and purposes with the aim of accelerating the development, and maximizing the value of PNOC assets and properties;

Article 1. Short Title. These Guidelines and Procedures shall be known as the “PNOC JV and Lease for Purely Commercial Arrangements Guidelines (“Guidelines”).”

Article 2. Principles. The PNOC shall enter into JVs and leases with PPs consistent with the following principles:

Section 1. The JV or lease activity shall be consistent with the mandate and authority of PNOC and other relevant laws, executive orders, rules and regulations, and applicable jurisprudence, to the extent applicable.

GUIDELINES AND PROCEDURES FOR ENTERING INTO JOINT VENTURE (JV) AND LEASE AGREEMENTS WITH THE PRIVATE SECTOR FOR PURELY COMMERCIAL ARRANGEMENTS

Section 2. The JV or lease activity shall maximize the value of PNOC assets or shall be efficient or potentially efficient towards earning potential profits and revenues for PNOC while providing reasonable returns for the PP.

Section 3. JV and lease activities of PNOC imbued with public interest, must be consistent and in furtherance of the country's development and investment plans, and must provide better quality of life for Filipinos.

Article 3. Purpose. This Guidelines are implemented to meet the following objectives:

1. To prescribe the rules, regulations, guidelines and procedures in entering into JVs and leases with PPs for projects or undertakings which are purely commercial consistent with PNOC's mandate to PNOC;
2. To maximize the value of PNOC assets, properties and facilities through the proper development, disposition, and operations thereof;
3. To encourage the participation of PPs possessing expertise and technical capabilities in property, facilities, and project development, and in operations and managements, to enter into JVs and leases with PNOC;
4. To make JVs with the private sector a viable, efficient, and practical alternative in pursuing the development goals of PNOC; and,
5. To ensure that all JVs and leases are entered into by PNOC through an open, fair, objective, transparent and competitive procedures that promote accountability in government transactions.

Article 4. Coverage. The PNOC Guidelines shall apply to all JVs and leases between the PNOC and PPs:

- a. Involving purely commercial arrangements that neither provide nor include public infrastructure or development services;
- b. For projects such as, but not limited to, shopping malls, paid parking, commercial office spaces, private buildings, retail or wholesale spaces, casinos, industrial or warehouse spaces, condominium development, entertainment centers, non-socialized housing units, golf courses and real estate development, with no public infrastructure or development services;

GUIDELINES AND PROCEDURES FOR ENTERING INTO JOINT VENTURE (JV) AND LEASE AGREEMENTS WITH THE PRIVATE SECTOR FOR PURELY COMMERCIAL ARRANGEMENTS

- c. For projects or activities where PNOC or Government shall not charge any tariff or user fees by the end users or the public;
- d. Where the property of PNOC or activity will solely be used by, or benefit, the PP or is limited to pre-defined users, and no component thereof shall be for public use;
- e. Where the use of the property by PNOC is optional and subject to commercial rate charges applicable to pre-defined users;
- f. In arrangements where the use or entitlement of PNOC over the property or portion thereof is the consideration under the JV or lease contract; and
- g. Where the property or activity will have no component falling under eligible projects under the IRR of R.A. No. 11966 unless the same falls under any of the above considerations and activities.

Interpretations of these Guidelines and provisions hereof relevant to the aforesaid coverage are subject to the approval of the PNOC Board.

Article 5. General Guidelines.

Section 1. PNOC shall create a Selection Committee (SC), which shall, at the minimum, be composed of the following:

- Chairperson - A Third Ranking official of PNOC;
 - One (1) Officer from the Office of the General Counsel (OGC);
 - One (1) Officer from the Accounting Department;
 - One (1) Officer knowledgeable in Project or Business Management and Operations; and,
 - One (1) Officer knowledgeable on Technical Aspects/ Requirements of the Project/Business Undertaking.
- Observer: Representative from the Office of the Government Counsel (Non-voting)

Section 2. The SC shall be responsible for:

- 2.1 all aspects of the pre-selection and selection process, including but not limited to the preparation of selection and/or tender documents, publication of the invitation to apply for eligibility and to submit a proposal, pre-qualification of prospective PPs, conduct of the pre-selection conference and issuance of supplemental notices, interpretation of rules regarding the selection process, conduct of the selection process, evaluation of financial and technical proposals, resolution of disputes between and among

GUIDELINES AND PROCEDURES FOR ENTERING INTO JOINT VENTURE (JV) AND LEASE AGREEMENTS WITH THE PRIVATE SECTOR FOR PURELY COMMERCIAL ARRANGEMENTS

PPs, and recommendation for the acceptance of the proposal and/or the award of the contract;

2.2 the processing of unsolicited proposals, from the receipt of proposals, the initial evaluation, and all other steps until rejection or contract award.

Section 3. PNOc may select PPs either through competitive selection or negotiated mode. In either case, it must ensure that the process of selection, award and approval are conducted in a transparent and competitive process that promotes accountability and efficiency through publication of the relevant terms and conditions of the competitive challenge/selection.

Article 6. Process for Entering into JVs and leases. Prior to entering into an agreement, the proposed JV or lease activity shall comply with the following conditions *sine qua non*:

- 6.1 The proposed JV or lease activity and proposed agreement should comply with Articles 2 and 4 hereof;
- 6.2 Clearly describe the proposed investment, including its activities, objectives, source(s) of funding, extent, and nature of the proposed participation of PNOc, period of participation of PNOc, and the relevant terms and conditions of the undertaking under the proposed agreement, among others;
- 6.3 Lay down the responsiveness and priority of the proposed JV or lease activity in meeting PNOc's development goals and objectives;
- 6.4 Establish all other components of the agreement, including the technical, financial, economic, legal and other aspects in determining the over-all feasibility of the proposed JV or lease activity, among others; and,
- 6.5 Secure all necessary and applicable clearances and/or approvals from other government agencies or offices.

Article 7. Modes of Selecting a Private Partner. The manner of selecting the private partner (PP) may either be through:

- 7.1 Competitive Selection – In the conduct of the Competitive Selection process, PNOc shall ensure the following:

GUIDELINES AND PROCEDURES FOR ENTERING INTO JOINT VENTURE (JV) AND LEASE AGREEMENTS WITH THE PRIVATE SECTOR FOR PURELY COMMERCIAL ARRANGEMENTS

7.1.1 all activities during the competitive selection, award, and final approval are conducted in a transparent and competitive process that promotes accountability and efficiency; and,

7.1.2 the competitive selection parameters are clearly defined and shall include the parameters as approved by the PNOC Board of Directors (PNOC Board).

7.2 Negotiated mode – Negotiated JVs or leases may be entered into under the following circumstances:

7.2.1 When PNOC receives and subsequently accepts an unsolicited proposal; or,

7.2.2 When there is failure in the competitive selection.

Article 8. Competitive Selection, Negotiated Mode, and Competitive Challenge Procedure.

Section 1. **Competitive Selection.** The process for the conduct of Competitive Selection, contract award and final approval shall be as follows:

1.1 **Selection/ Tender Documents.** The SC is responsible for the preparation of the selection/tender documents appropriate for the mode of selection and the particular project. These may include:

1.1.1 **Instructions to PPs.** This contains the general description and objectives of the JV or lease activity; proposal submission procedures and requirements; amount, form and validity period of proposal security; milestones; method, parameters and criteria for the evaluation of the proposals; minimum amount of equity required from the PP; requirements of concerned regulatory bodies/agencies as may be pertinent or applicable to the JV or lease activity; revenue sharing arrangement, dividends policy, if any; and nationality and ownership requirements as required by law;

1.1.2 **Minimum Design, Performance Standards/ Specifications.** This shall include appropriate environmental standards by the Department of Environment and Natural Resources (DENR) and other standards set by PNOC and other concerned regulatory

GUIDELINES AND PROCEDURES FOR ENTERING INTO JOINT VENTURE (JV) AND LEASE AGREEMENTS WITH THE PRIVATE SECTOR FOR PURELY COMMERCIAL ARRANGEMENTS

agencies as may be pertinent or applicable to the JV or lease activity.

1.1.3 **Financial and Economic Parameters**

For purposes of evaluating JV or lease proposals, the following economic parameters, among others and where applicable, shall be prescribed (i) discount rate, foreign exchange rate and inflation factor; (ii) maximum period of project construction (iii) fixed term and price indices to be used in the adjustments of tolls/fees/rentals/charges, and (iv) minimum period of repayment;

1.1.4 **Feasibility Study or Pre-feasibility Study of the Proposed Project;**

1.1.5 **Draft Contract** reflecting the terms and conditions in undertaking the JV or lease activity, including the contractual obligations of the contracting parties and the ownership of the JV or lease activity, project or property after the termination of the JV or lease. The draft contract shall include provisions on the following matters, as far as practicable:

1.1.5.1 Clearly defined purpose and objectives, term and scope of the JV or lease;

1.1.5.2 Total cost of the JV or lease activity, project, specifications and features;

1.1.5.3 The relationship between the parties, management roles in the JV or lease activity, and a statement that the parties are actually co-venturers for the project, whether or not the contract is in the name of all members;

1.1.5.4 In incorporated JVs, the establishment of a fund by the parties to finance the work, together with the amount, type (cash, assets, etc.), and valuation of committed contributions of each party and when such contributions will be made, with the fund being deposited in a special bank account under proportionate control and all progress payments and other revenues being deposited in such account. If the equity/contribution of the PP

GUIDELINES AND PROCEDURES FOR ENTERING INTO JOINT VENTURE (JV) AND LEASE AGREEMENTS WITH THE PRIVATE SECTOR FOR PURELY COMMERCIAL ARRANGEMENTS

is to be borrowed, a statement that there shall be no government guarantee for said loans;

- 1.1.5.5 Where applicable, procedures for additional capital infusions, if required, and a statement that there shall be no government guarantee for loans to be incurred by the PP in case the additional contribution of the PP is to be borrowed;
- 1.1.5.6 Where applicable, a declaration of the participation of the parties and percentage in which profits and losses are shared, in proportion to the contributions of the party to the working fund. The amount of contribution of funds by the parties can be increased or decreased, depending on the contributions of equipment or expertise;
- 1.1.5.7 Specified termination of the JV or lease, buy-out provisions, and details on the transfer of ownership of the JV or lease activity/facility including provisions on what happens to the JV or leased assets/improvements after the expiration of the agreement or end of the JV or lease period. If equity other than cash is to be contributed, a statement as to how the property will be appraised and valued, and the ownership thereof, during and after the effectivity of the agreement.
- 1.1.5.8 Implementation milestones, regular meeting schedules, financial and periodic progress reporting procedure;
- 1.1.5.9 For JVs, definition of items which are to be considered as costs to the JV for the purpose of determining profit or loss and a description of items which are not reimbursable to members of JV, and specified division of the profits and risks and losses;
- 1.1.5.10 Performance security requirement of the project and the bonding obligations of the Parties;
- 1.1.5.11 For JVs, undivided pro-rata interests held by the co-venturers on all assets of the JV;

GUIDELINES AND PROCEDURES FOR ENTERING INTO JOINT VENTURE (JV) AND LEASE AGREEMENTS WITH THE PRIVATE SECTOR FOR PURELY COMMERCIAL ARRANGEMENTS

- 1.1.5.12 For JVs, restriction regarding assignment of PP's undivided pro-rata interests in assets of the JV;
- 1.1.5.13 Where applicable, cost recovery scheme, including payment to the government of royalties/rights, the form /description and amount of earnings (cash, asset, etc.), whether they are in absolute amounts or variable, and the period and timing such earnings or payment shall be received. In case of non-cash payment or payment in form of asset, a statement/provision on how it will be valued, the minimum value of asset, and the determination /selection of asset such as how and who will determine/select the asset;
- 1.1.5.14 Indemnification and liquidated damages;
- 1.1.5.15 Performance and warranty bonds;
- 1.1.5.16 Minimum Insurance coverage;
- 1.1.5.17 Acceptance tests and procedures;
- 1.1.5.18 Validity of the performance security, warranty period and procedures;
- 1.1.5.19 Grounds for and effects of contract termination/default including modes for setting disputes, procedure for handling guarantees, defects and insurance after termination, and threshold (in terms of amount, time/period, or both) for which non-payment or delay in payment and delay in starting the project/s shall be grounds for termination/rescission of the JV or lease contract/agreement;
- 1.1.5.20 The manner and procedures for the resolution of warranty against corruption;
- 1.1.5.21 Compliance with all other laws, rules and regulations;

GUIDELINES AND PROCEDURES FOR ENTERING INTO JOINT VENTURE (JV) AND LEASE AGREEMENTS WITH THE PRIVATE SECTOR FOR PURELY COMMERCIAL ARRANGEMENTS

- 1.1.5.22 For JVs, procedure and/or period for withdrawal by the government entity of its contribution to the JV, or the exit of divestment by the government entity of its interest in the JV, and substitution or addition of parties;
 - 1.1.5.23 Payout of funds; and,
 - 1.1.5.24 Dispute resolution clause.
 - 1.1.6 **Selection Form** reflecting the required information to properly evaluate the technical and financial proposal;
 - 1.1.7 **Forms** of technical and financial proposals and performance securities; and,
 - 1.1.8 **Other documents** as may be required by the SC and other requirements of concerned regulatory agencies as may be pertinent or applicable to the JV or lease activity.
- 1.2 **Publication of Invitation to Apply for Eligibility and to Submit a Proposal (IAESP).** The IAESP shall be advertised at least once a week for three (3) consecutive weeks in a newspaper of general nationwide circulation, and posted continuously at the website of PNOC starting on the date of advertisement until acceptance. Interested PPs shall be given thirty (30) calendar days from the last date of publication in a newspaper of general nationwide circulation of the IAESP to apply for eligibility and to submit a proposal. Notwithstanding, PNOC may adjust said period as may be appropriate for the nature, scope, size and complexity of the proposed JV or lease activity; provided, that the principles of transparency, competition and accountability are observed.
- 1.3 **Qualifications of PP.** Any individual, partnership, corporation, firm, or consortium, whether local or foreign, may participate subject to the limits set herein:
- 1.3.1 **Legal Capacity.** The prospective PP must meet the nationality and ownership requirements under the 1987 Philippine Constitution and other applicable laws and issuances.
 - 1.3.2 **Technical Capability.** The prospective PP, by itself or through member-firm/s in case of a consortium, or through consultant(s)/contractor(s) which the

GUIDELINES AND PROCEDURES FOR ENTERING INTO JOINT VENTURE (JV) AND LEASE AGREEMENTS WITH THE PRIVATE SECTOR FOR PURELY COMMERCIAL ARRANGEMENTS

prospective PP may engage for the project, must have successfully undertaken project(s) similar or related to the JV or lease activity being proposed or subjected to selection process. The cost and the relevant period in which the similar projects were undertaken shall be determined by the SC depending on the scope and value of the proposed Project or JV or lease activity. The individual firms and/or its consultant(s)/contractor(s) may individually specialize on any or several phases of the project(s). A consortium proponent shall be evaluated based on the individual or collective experience of the member-firms and of the consultant(s)/contractor(s) that is engaged for the project.

- 1.3.3 Financial capability eligibility requirements. The SC shall determine before evaluation of eligibility, the minimum amount of equity needed for the JV or lease activity. Financial capability shall be measured in terms of the ability of the prospective PP to provide a minimum amount of equity to the JV or lease activity, which shall be determined by the SC depending on the scope and the value of the proposed project. The minimum equity shall be measured in terms of proof of the ability of the prospective PP and/or consortium to provide:

Equity

- 1.3.3.1 A minimum amount of equity to the project measured in terms of the net worth of the PP, or in the case of a consortium, the net worth of the lead member or the combined net worth of members; or
- 1.3.3.2 Set-aside deposit equivalent to the minimum equity required, or

Debt

- 1.3.3.3 A notarized statement/certification from a domestic universal/commercial bank or any international bank recognized by the Bangko Sentral ng Pilipinas attesting that the prospective Project Proponent and/or members of the consortium are banking with them, and that they are in good financial standing and/or are

GUIDELINES AND PROCEDURES FOR ENTERING INTO JOINT VENTURE (JV) AND LEASE AGREEMENTS WITH THE PRIVATE SECTOR FOR PURELY COMMERCIAL ARRANGEMENTS

qualified to obtain credit accommodations from such banks to finance the project.

- 1.3.4 Acceptance of Criteria and Waiver of Rights to Enjoin JV or Lease Activity. In addition to the above, all prospective PPs shall be required to submit, as part of their qualification documents, a statement stipulating that the PP: (i) has accepted the qualification criteria established by the SC of PNOC; and (ii) waives any right it may have to seek and obtain a writ of injunction or prohibition or restraining order against PNOC or its SC to prevent or restrain the qualification proceedings related thereto, the award of the contract to a successful PP, and the carrying out of the awarded contract.
- 1.3.5 If the PP is a consortium, it must also submit a copy of the Consortium Agreement, which shall include the following information:
 - 1.3.5.1 brief description of the consortium, the individual members of the consortium and the nature and extent of the participation which may include a statement of the capital of each member in relation to the whole capital or their respective participation or involvement in the proposed project;
 - 1.3.5.2 the lead member of the consortium, who is authorized by all the members to represent and sign any and all documents related to this bidding including the agreement with PNOC; and,
 - 1.3.5.3 agreement of all members to be jointly and severally liable for the obligations of the consortium under the award/contract.
- 1.4 Eligible and Ineligible. PNOC, through its SC, shall, within a maximum period of thirty (30) calendar days after the deadline for submission of eligibility documents, complete the evaluation of the eligibility documents of the prospective JV Partners and determine which among them are "eligible" and "ineligible" using a non-discretionary Pass/Fail criteria. Within fifteen (15) calendar days after such determination, the SC shall duly inform the prospective

GUIDELINES AND PROCEDURES FOR ENTERING INTO JOINT VENTURE (JV) AND LEASE AGREEMENTS WITH THE PRIVATE SECTOR FOR PURELY COMMERCIAL ARRANGEMENTS

PPs in writing of their eligibility or ineligibility. In case of the latter, the grounds for ineligibility must be stated in the notice.

- 1.5 Issuance of Tender Documents. PNOC shall make available the related competitive selection documents to all eligible PPs as soon as practicable to provide them ample time to examine the same and to prepare their respective proposals prior to the date of opening of the proposals. The time period from the last day of the issuance of tender documents to the date of opening of the proposal shall not exceed forty-five (45) calendar days.

The proposal parameters for the proposed JV or lease activity should be transparent and fair. It should not, in any way, be tailor-made for or be meant to favor or give advantage to a particular PP.

- 1.6 Supplemental Competitive Selection Bulletins and Pre-Selection Conferences.

- 1.6.1 Responsibility of the PP. The prospective PP shall be solely responsible for examining and understanding the requirements and terms and conditions of the selection documents with respect to the cost, duration and execution/operation of the project as it affects the preparation and submission of its proposal. PNOC shall not assume any responsibility regarding erroneous interpretations or conclusions by the prospective PPs from information furnished or indicated in the competitive selection documents.

- 1.6.2 Supplemental Notices. On or before the pre-selection conference, a prospective PP may submit to PNOC a written request for clarification as to any data or requirements or any part of the selection documents. Any substantive interpretation given by PNOC shall be issued in the form of a Supplemental Notice, and be furnished to all prospective PPs. PNOC may also issue Supplemental Notices to all prospective PPs at any time for purposes of clarifying any provisions of the selection documents, provided that the same are issued within reasonable period to allow PPs to consider the same in the preparation of their proposals.

- 1.6.3 Pre-Selection Conference. PNOC shall conduct a pre-selection conference at least thirty (30) calendar days before the deadline for the submission of proposals.

GUIDELINES AND PROCEDURES FOR ENTERING INTO JOINT VENTURE (JV) AND LEASE AGREEMENTS WITH THE PRIVATE SECTOR FOR PURELY COMMERCIAL ARRANGEMENTS

Notwithstanding, PNOC may adjust said period as may be appropriate for the nature, scope, size and complexity of the proposed JV or lease activity; provided, that the principles of fairness, transparency, competition and accountability are observed.

- 1.7 Submission and Receipt of Proposals. PPs shall be required to submit their proposals on or before the deadline stipulated in the "Instructions to Private Sector Entities." For eligible participants, proposals shall be submitted in two (2) separate sealed envelopes, the first being the technical proposal and the second, the financial proposal.
 - 1.7.1 The Technical Proposal shall contain the following, as far as applicable, (i) compliance statements with regard to the technical parameters as stated in the tender documents; (ii) operational feasibility; (iii) technical soundness, including proposed project timeline; (iv) preliminary environmental assessment; (v) other documents to support the PP's technical proposal, as may be required by PNOC;
 - 1.7.2 The Financial Proposal shall contain the following, as the case may be, (i) compliance statements with regard to the financial parameters stated in the tender documents; (ii) proposed cost and financing plan of the JV or lease activity, operation and maintenance cost, the amount of equity to be infused and debt to be obtained for the project, sources of financing, and all other related costs; and, (iii) other details corresponding to the parameters set by PNOC; (iv) cost and financing plan of the JV or lease activity; and
 - 1.7.3 Proposal security in the amount to be determined by PNOC, but which shall not be more than ten percent (10%) of the cost of the JV or lease activity subject of the selection process. The proposal security shall be in the form of a bank manager's check or cashier's check issued by a universal or commercial bank. In the case of an Original Proponent (OP) of an unsolicited proposal, the OP shall post the Proposal Security on the first day of the publication of the Invitation to Apply for Eligibility and to Submit a Comparative Proposal (IAESCP) in the amount and form stated in the tender documents. The

GUIDELINES AND PROCEDURES FOR ENTERING INTO JOINT VENTURE (JV) AND LEASE AGREEMENTS WITH THE PRIVATE SECTOR FOR PURELY COMMERCIAL ARRANGEMENTS

proposal security shall be valid until the parties' execution of the contract.

1.7.4 PNOC is not precluded from specifying other requirements for the technical and financial proposals that are best suited for the specific JV or lease activity.

1.8 Submission of late proposals. Proposals submitted after the deadline for submission prescribed in the "Instructions to Private Sector Entities" shall be considered late and shall be stamped with the date and time received and be returned unopened.

1.9 Opening and Evaluation of Proposals.

1.9.1 Opening of the Envelope for the Technical Proposal. At the date and time of the proposal opening stipulated in the "Instructions to Private Sector Entities," the SC shall open only the first envelope containing the technical proposal and ascertain: (a) whether the same is complete in terms of the data/information required; and, (b) whether the same is accompanied by the required proposal security in the prescribed form, amount, and period of validity. All PPs or their representatives present at the opening of the envelopes containing the Technical proposal shall sign a register of the proposal opening.

1.9.2 Evaluation of the Technical Proposal. The evaluation of the first envelope containing the Technical Proposal shall involve the assessment of the technical, operational, and environmental viability of the proposal, vis-à-vis the prescribed requirements and criteria/minimum standards, and basic parameters prescribed in the competitive selection documents. The SC shall complete the evaluation of the technical proposals within thirty (30) calendar days from the date the proposals are opened. Only those proposals that have positively passed the evaluation of the Technical proposal shall be qualified and considered for the evaluation of the Financial Proposal.

1.9.3 Opening of the Envelope for the Financial Proposal. Only the Financial Proposals of PPs who passed the technical proposal evaluation shall be opened for further evaluation. The financial proposals tendered by PPs who failed the technical proposal evaluation shall not be

GUIDELINES AND PROCEDURES FOR ENTERING INTO JOINT VENTURE (JV) AND LEASE AGREEMENTS WITH THE PRIVATE SECTOR FOR PURELY COMMERCIAL ARRANGEMENTS

considered further, and shall be returned unopened, together with a notice stating the reasons for disqualification. The SC shall notify the qualifying PPs of the second stage of evaluation of the date, time and place of the opening of the envelopes for the financial proposal. The opening thereof shall follow the same procedure prescribed for the opening of the envelopes containing Technical Proposals.

- 1.9.4 Evaluation of the Financial Proposal. The evaluation of the Financial Proposal shall involve the assessment and comparison of the Financial Proposals against the financial parameters stated in the tender documents and proposals parameters set by PNOC. The proposed financing plan must show that the same adequately meets the costs relative to the JV or lease activity. The evaluation of Financial Proposals shall be completed by the SC within fifteen (15) calendar days.
- 1.9.5 Simultaneous Evaluation of the Technical and Financial Proposals. Simultaneous evaluation of the technical and financial proposals may be resorted to if the SC determines that the nature of the JV or lease activity requires the appreciation of both the Technical and Financial Proposals as a whole in order to determine the best proposal. In such case, the tender documents shall explicitly state the evaluation procedure. Simultaneous evaluation of the Technical and Financial Proposals shall be completed within thirty (30) calendar days from the date the proposals are opened.
- 1.9.6 Prescriptive Periods. The periods stated for the evaluation of the Technical and Financial Proposals are prescriptive and directory. The SC may adjust said periods as may be appropriate for the nature, scope, size and complexity of the proposed JV or lease activity. Provided, that the principles of fairness, transparency, competition and accountability are observed.
- 1.9.7 Rejection of Proposals. Non-compliance to the information required on either the first or second envelope shall be grounds for rejection of proposals.
- 1.9.8 Withdrawal and/or Modification of Proposals. Withdrawals and/or modification of proposals may be

GUIDELINES AND PROCEDURES FOR ENTERING INTO JOINT VENTURE (JV) AND LEASE AGREEMENTS WITH THE PRIVATE SECTOR FOR PURELY COMMERCIAL ARRANGEMENTS

allowed upon written notice by the PP concerned to the SC prior to the time and date set for the opening of the envelope containing the Technical Proposal as specified in the "Instructions to the Private Sector Entities." No proposals shall thereafter be modified or withdrawn. Proposal modifications received after said period shall be considered late and will be returned unopened. Withdrawal of proposals after the proposal opening date shall cause the forfeiture of the PP's Proposal Security.

1.9.9 Right to Reject All Proposals. PNOB reserves the right to reject any or all proposals, waive any minor defects therein and accept the offer it deems most advantageous to the government.

1.9.10 Breaking Tie Bids. In case tie bids occurs under competitive selection or competitive challenge, the procedure for breaking the bids shall be done through drawing of lots or similar methods that are non-discretionary and non-discriminatory such that it is based on sheer luck or chance.

1.10 Award and Approval of Contract.

1.10.1 Recommendation to Award. Within seven (7) calendar days from the completion of the evaluation procedure by the SC, the PNOB shall recommend to the PNOB Board the approval of the award to the Winning PP. The SA's Memorandum to the PNOB Board recommending the award should contain the SC recommendation, including minutes of negotiation meetings duly signed by all its members, and the SC evaluation/assessment report on the proposals explaining in clear terms the basis of its recommendations.

1.10.2 Decision to Award. Within seven (7) calendar days from the submission by the SA of the recommendation to award, the PNOB Board shall approve or reject the same. The approval shall be manifested by signing and issuing the "Notice of Award" to the Winning PP within seven (7) calendar days from approval thereof. PNOB shall post a corresponding "Notice" on its website declaring the award of the JV or lease contract to the Winning PP.

GUIDELINES AND PROCEDURES FOR ENTERING INTO JOINT VENTURE (JV) AND LEASE AGREEMENTS WITH THE PRIVATE SECTOR FOR PURELY COMMERCIAL ARRANGEMENTS

- 1.10.3 **Notice of Award.** The “Notice of Award” to be issued by the PNOC shall contain, among others, an instruction to the Winning PP to comply with condition precedent for the execution of the agreement and to submit compliance statements with regard thereto, within fifteen (15) calendar days from receipt of the “Notice of Award” unless otherwise specified or extended by PNOC.
- 1.10.4 **Performance Security.** Conditions precedent for the execution of the agreement shall include the posting of a Performance Security in favor of PNOC. The SC shall determine which form of Performance Security it will require, which may be in the form of cash, bank draft or guarantee confirmed by a local bank (in the case of foreign bidders bonded by a foreign bank), letter of credit issued by a reputable bank, surety bond callable on demand issued by the Government Service Insurance System (GSIS) or by a surety or insurance companies duly accredited by the Insurance Commission as follows: (i) cash, Manager’s Check, irrevocable letter of credit, bank draft - a minimum of two percent (2%) of the PP’s contribution to the JV activity or PNOC for lease; (ii) Bank Guarantee - a minimum of five percent (5%) of the PP’s contribution to the JV activity or PNOC for lease; or, (iii) Surety Bond - a minimum of ten percent (10%) of the PP’s contribution to the JV activity or or PNOC for lease.

Failure to comply with the conditions precedent for the execution of the contract within the prescribed thirty (30)-calendar day period or as specified or extended by PNOC will result in confiscation of the Performance Security. Within seven (7) calendar days from receipt of the compliance statements from the winning PP, PNOC shall determine the sufficiency of the same, and notify the winning PP accordingly.

- 1.10.5 **Validity and Return of Proposal and Performance Securities.** The execution of the agreement shall be made within the period of the validity of the Proposal Security. The required Proposal Security shall be valid for a reasonable period, but in no case beyond One Hundred Eighty (180) calendar days following the opening of the proposals. Unless earlier forfeited, Proposal Securities shall be returned to all PPs upon signing of the agreement by the winning PP.

GUIDELINES AND PROCEDURES FOR ENTERING INTO JOINT VENTURE (JV) AND LEASE AGREEMENTS WITH THE PRIVATE SECTOR FOR PURELY COMMERCIAL ARRANGEMENTS

The Performance Security shall be valid within the period of one (1) year after the expiration of the lease or end of the JV period, or as may be stipulated in the agreement. Upon certification by PNOC that there are no claims filed against the Winning PP after the expiration of the lease agreement or end of the JV period, the Performance Security shall be released by the former. As may be agreed upon in the agreement, a portion of the Performance Security shall be released upon compliance with corresponding milestones.

- 1.10.6 **Extension of Validity of Proposals.** When an extension of validity of proposals is considered necessary, those who submitted proposals shall be requested in writing to extend the validity of their proposals before the expiration date of the same. However, PPs shall not be allowed to modify or revise the price or other substantial aspect of their proposal. Further, PPs must correspondingly extend the validity of their Proposal Security as a condition for the extension of the validity of their proposals.

PPs shall not refuse such request for extension except on the following grounds: (1) loss of interest in the Project, and (2) unforeseen financial meltdown/crisis. PPs who refuse the request based on these grounds shall not forfeit their Proposal Security.

- 1.10.7 **Single Responsive Bid.** A single and responsive bid shall be considered for award if it falls under any of the following circumstances: (i) if, after advertisement, only one PP submits eligibility documents within the deadline stipulated in the IAESP, and such PP meets the eligibility requirements and submit a bid which is responsive to the technical and financial requirements; (ii) if, after advertisement, multiple PPs submit eligibility documents, in accordance with the provisions of these Guidelines, but only one meets eligibility requirements and such eligible PP submits a bid which is responsive to the technical and financial requirements; (iii) if, after the eligibility check, multiple PPs meet the eligibility requirements but only one submits a bid, and its bid is found to be responsive to the technical and financial requirements; or, (iv) if, after qualification/evaluation of

GUIDELINES AND PROCEDURES FOR ENTERING INTO JOINT VENTURE (JV) AND LEASE AGREEMENTS WITH THE PRIVATE SECTOR FOR PURELY COMMERCIAL ARRANGEMENTS

proposals, only one PP meets the technical requirements but is not able to comply with financial requirement, and a negotiation of the financial terms/ proposal in accordance with Section 6.13 (i) hereof is conducted and is successful.

1.10.8 **Prospective Bidder/s Compliant with the Technical Requirement.** In case no technically qualified prospective bidder is able to comply with financial requirements, PNOC may conduct negotiation on the financial terms in accordance with the instant PNOC JV and Lease for Commercial Use Guidelines.

1.10.9 **Negotiation on the Financial Terms/Proposal under the Competitive Selection Process.** In case all the eligible PPs, whose Technical Proposals are rated “passed”, are not able to comply with the financial requirements, PNOC shall request said participants to submit the new Financial Proposals. Thereafter, the SC shall notify and negotiate with the proponent with the most advantageous Financial Proposal. The Technical Proposal shall remain valid and binding. In the event the SC fails to successfully negotiate with said proponent within thirty (30) calendar days reckoned from the date of notification, the SC shall negotiate with the next ranked most advantageous financial proposal, and so on and so forth, until a successful negotiation has been concluded.

In case of a single technically qualified participant, PNOC may conduct negotiations on the financial terms or on the Financial Proposal and shall conclude said negotiation within fifteen (15) calendar days. The Technical Proposal shall remain valid and binding.

If there is no successful negotiation, PNOC shall conduct another competitive selection. In case of a second failure of competitive selection, PNOC may resort to a Negotiated JV.

1.10.10 **Failure of Competitive Selection.** There shall be a failure of competitive selection in any of the following instances: (i) no prospective bidder/s is/are eligible; (ii) no bids or proposals are received; (ii) no prospective bidders/s is/are able to comply with technical requirements; or (iii)

GUIDELINES AND PROCEDURES FOR ENTERING INTO JOINT VENTURE (JV) AND LEASE AGREEMENTS WITH THE PRIVATE SECTOR FOR PURELY COMMERCIAL ARRANGEMENTS

no successful negotiation on the financial terms/proposal as provided herein.

In the event of a failed competitive selection brought about by the instances stipulated above, the SC shall review the Terms of Reference (TOR), bidding documents and conduct another competitive selection. In case of a second failure of competitive selection, PNOC may resort to Negotiated Mode.

1.10.11 Execution/Approval of the agreement. The authorized signatory(ies) of the Winning PP and PNOC, shall execute and sign the agreement, within seven (7) calendar days after PNOC notifies the Winning PP of its compliance to the conditions or requirements precedent to the execution of the contract.

In the event of refusal, inability or failure of the Winning PP to enter into contract with PNOC within the time provided therefore, PNOC shall forfeit its Proposal Security. In such event, PNOC shall consider the PP with the next ranked complying proposal as the Winning PP, and notify said PP accordingly. If the next ranked complying PP shall likewise refuse or fail to enter into contract with PNOC, its Proposal Security shall likewise be forfeited and PNOC shall consider the next ranked complying proposal, and so on, until a contract shall have been entered into. In the event that PNOC is unable to execute the contract with any of the complying PPs, a failure of competitive selection will be declared and the JV or lease activity may be subjected to a competitive selection again.

1.10.12 Deviation and Amendments to the agreement. PNOC shall not proceed with the award and signing of the contract if there are material deviations from the parameters, terms and conditions set forth in the proposal/tender documents that tend to increase the financial exposure, government liabilities and risks or any other factor that would cause disadvantage to government and any deviation that will cause prejudice to losing PPs. Violation of this provision shall render the award and/or the signed agreement invalid.

GUIDELINES AND PROCEDURES FOR ENTERING INTO JOINT VENTURE (JV) AND LEASE AGREEMENTS WITH THE PRIVATE SECTOR FOR PURELY COMMERCIAL ARRANGEMENTS

1.10.13 **Other Approval for Contract.** The entity tasked under the agreement shall, as may be required under existing laws, rules and regulations, secure any and all other approvals for the contract, or the implementation thereof, from government agencies or bodies including the regulator, or in the case of public utility projects. PNOC may provide the necessary assistance to its PP in securing all the required clearances. The contract shall provide milestones in securing such other approvals required for the implementation of the contract. In case of unsolicited projects, PNOC will ensure that required approvals under existing laws shall be complied with as condition precedents prior to contract effectivity.

Prior to the execution of the agreement, the OGCC as the statutory counsel of PNOC, shall issue the corresponding Counsel's Opinion.

1.10.14 **Contract Effectivity.** The contract shall be effective upon signing thereof by the SA unless another date is stipulated therein.

1.10.15 **Amendment of agreement.** Any amendment to the agreement must be executed in writing by the co-venturers, provided, that such option is incorporated in the agreement and that such right is available to any PP declared eligible in the competitive selection or challenge process.

Section 2. **Negotiated JVs and leases and Competitive Challenge.** In case of unsolicited proposals, and in all cases where PNOC directly negotiates with the PP for a proposed JV or lease activity, the negotiated terms shall be subjected to a competitive challenge wherein other PPs shall be invited to submit comparative financial proposals.

2.1 The PNOC and PP shall negotiate on the terms and conditions of the proposed JV or lease activity; which negotiations shall, as far as practicable, comply with the same process, requirements and conditions as in the case of JV or lease proposals solicited through the competitive selection process.

It is understood, however, that the competitive challenge is limited only to the financial aspect of the project. The technical aspect of the project, as agreed upon during the negotiations,

GUIDELINES AND PROCEDURES FOR ENTERING INTO JOINT VENTURE (JV) AND LEASE AGREEMENTS WITH THE PRIVATE SECTOR FOR PURELY COMMERCIAL ARRANGEMENTS

shall be adopted by third party challengers; otherwise, they shall be declared ineligible.

- 2.2 The process for the conduct of Competitive Challenge, contract award and final approval shall also follow the provisions of Article 8 hereof to the extent applicable.

Section 3.

Unsolicited JV Proposals. When PNOC receives a proposal from the PP for a JV or lease activity, the SC shall conduct a preliminary evaluation. The preliminary evaluation shall be completed by the SC within thirty (30) calendar days upon submission of complete documents by the PP. The SC shall determine on preliminary evaluation the completeness of the proposal and whether the proposed JV or lease activity meets the requirements under Article 6 hereof.

A complete proposal shall contain the following documents:

- 3.1 Cover letter indicating the basic information of the unsolicited proposal, such as:
 - 3.1.1 Description of the proposed project (rationale, objectives)
 - 3.1.2 Land area and location of the proposed property to be leased or used for the joint venture activity
 - 3.1.3 Project implementation schedule
 - 3.1.4 Other relevant information
- 3.2 Company Profile
 - 3.2.1 SEC papers or the equivalent document from the country of incorporation which includes Articles of Incorporation and By-Laws
 - 3.2.2 Latest General Information Sheet (GIS)
 - 3.3.3 Latest Tax Returns (Income and Business Taxes)
- 3.3 Feasibility/Pre-Feasibility Study
- 3.4 Draft Contract/Term Sheet
- 3.5 Other documents that are needed even if proprietary in nature

Upon completion of the preliminary evaluation, the SC shall recommend to the SA the acceptance or non-acceptance of the proposal. The SA shall endorse his/her recommendation to the PNOC Board for approval. Acceptance of the proposal by the PNOC Board

GUIDELINES AND PROCEDURES FOR ENTERING INTO JOINT VENTURE (JV) AND LEASE AGREEMENTS WITH THE PRIVATE SECTOR FOR PURELY COMMERCIAL ARRANGEMENTS

does not confer upon the PP OPS. The PNOC and the PP shall, within a period of five (5) calendar days from acceptance by the PNOC Board, enter into detailed negotiations on the terms and conditions of the proposed JV or lease activity (i.e. legal, technical and financial components). The negotiations shall be completed within ten (10) calendar days. The terms of detailed negotiations as well as conferment of OPS to the PP shall be approved by the PNOC Board.

Should the parties not agree by the end of the negotiation period, PNOC shall have the option of rejecting the proposal by informing the PP in writing of the grounds for rejection; and, thereafter enter into negotiations with the next highest ranked proponent and so on (if multiple unsolicited proposals have been received by PNOC) until the PNOC has conferred upon the PP OPS. If no PP has been conferred OP Status, PNOC may accept a new proposal from another PP, or pursue the proposed activity through alternative routes other than JV or lease.

Within a maximum of seven (7) calendar days after the successful negotiation and approval thereof by the PNOC Board, PNOC and the authorized representative of the PP shall issue a signed certification that an agreement has been reached and both agree to submit the proposal to a competitive challenge. Said certification shall also state that PNOC has found the PP eligible to enter into the proposed JV or lease activity and shall confer an OP Status (OPS) to the latter.

OPS will only be given after the approval by both parties of the Certification of Successful Negotiation (CSN).

After the award of the OPS, the selection documents for the competitive challenge, including the draft contract, shall be prepared by the SC. The selection documents shall be consistent with the tender documents enumerated in Article 8, Section 1.1 herein to the extent applicable. The draft contract for the JV or lease shall be reviewed by the OGCC.

3.6 Publication of the Invitation to Apply for Eligibility and to Submit Comparative Proposal (IAESCP)

The SC shall adopt the recommendations of OGCC in its review of the draft contract for the JV or lease. The SC, through the SA shall then endorse to the PNOC Board for approval the draft JV or lease contract as reviewed by OGCC. Within fifteen (15) calendar days from PNOC Board approval of the draft JV or lease contract incorporating the comments and recommendations of the OGCC, the SC shall cause the publication of the Invitation to Apply for Eligibility and to Submit a Comparative Proposal

GUIDELINES AND PROCEDURES FOR ENTERING INTO JOINT VENTURE (JV) AND LEASE AGREEMENTS WITH THE PRIVATE SECTOR FOR PURELY COMMERCIAL ARRANGEMENTS

(IAESCP). The IAESCP shall be published once a week for three (3) consecutive weeks in a newspaper of general nationwide circulation and posted continuously in the PNOC website starting on the date of advertisement until acceptance. Interested PPs shall be given thirty (30) calendar days from the last date of publication in a newspaper of general nationwide circulation of the IAESCP to apply for eligibility and to submit a comparative proposal. Notwithstanding, PNOC may adjust said period as may be appropriate for the nature, scope, size and complexity of the proposed JV or lease activity; provided, that the principles of transparency, competition and accountability are observed.

- 3.7 Interested PP challengers shall be qualified in accordance with Article 8, Sections 1.3 and 1.4 herein. The tender documents for the competitive challenge shall only be issued to eligible PP challengers.
- 3.8 **Right to Outbid.** The Right to Outbid is an automatic right bestowed upon the OP.

If PNOC determines in the foregoing cases that an offer made by a comparative PP-challenger other than the OP is superior or more advantageous in terms of higher Internal Rate of Return (IRR) to the PNOC than the original proposal, the OP shall be given the right to match the better offer of the challenger. Outbidding by the original proponent of the challenger's offer shall be measured in terms of a higher IRR and/or revenues than the challenger's comparative proposal as the SC may determine as appropriate taking into consideration the proposal that is most advantageous to PNOC. The OP's matching bid shall be submitted within fifteen (15) calendar days from receipt of notification from the PNOC of the results of the competitive challenge. If the OP submits a matching offer within the prescribed period, the JV or lease activity shall be awarded to the OP. However, should there be no matching offer received from the OP within the prescribed period, the JV or lease activity shall be awarded to the challenger submitting the most advantageous proposal to PNOC. However, if no comparative proposal is received by the PNOC challenging the original proposal, the JV Activity shall immediately be awarded to the OP.

- 3.9 If there is more than one unsolicited proposal submitted for the same project, the SA, upon recommendation of the SC, may reject all proposals and pursue competitive selection, or accept the

GUIDELINES AND PROCEDURES FOR ENTERING INTO JOINT VENTURE (JV) AND LEASE AGREEMENTS WITH THE PRIVATE SECTOR FOR PURELY COMMERCIAL ARRANGEMENTS

unsolicited proposal that is complete and provides the higher IRR and/or revenues deemed most advantageous to PNOG.

Article 9. Submission of Award to PNOG Board. Within ten (10) calendar days from the date of completion of the Competitive Challenge, the SC, through the SA, shall submit the recommendation of award to the PNOG Board. Succeeding activities shall be in accordance with Article 8, Section 1.10 of PNOG JV and Lease for Commercial Use Guidelines (Award and Approval of Contract).

Article 10. Appeals Mechanism. A PP aggrieved by the decisions of the SC may, within five (5) calendar days from receipt of the SC decision, seek a motion for reconsideration thereof.

The SC shall resolve the motion for reconsideration within five (5) calendar days from receipt thereof. In the event that the SC denies the motion for reconsideration, the aggrieved PP may appeal the same to the PNOG Board by filing a verified position paper with the PNOG Board and paying a non-refundable appeal fee of one-half (1/2) of one percent of the proposed project cost, within five (5) calendar days from receipt of the SC resolution denying the motion for reconsideration.

The PNOG Board shall act on the appeal within fifteen (15) calendar days from receipt of the appeal. The decision of the PNOG Board on the appeal shall be final and immediately executory. If the appeal is not resolved within the said period, the appeal is deemed denied.

Article 11. Amendments. The PNOG JV and Lease for Commercial Use Guidelines may be amended and/or modified from time to time by PNOG.

Article 12. Separability. If any provision of the PNOG JV and Lease for Commercial Use Guidelines is held or declared void or unenforceable by final judgement of a court of competent jurisdiction, the other provisions unaffected thereby shall remain in full force and effect.

Article 13. Transitory Provisions. The provisions of the PNOG JV and Lease for Commercial Use Guidelines shall, upon its effectivity, apply to all pending or under evaluation JV or lease proposals.

PPs with pending or under evaluation JV or lease proposals shall be given thirty (30) calendar days within which to comply and/or complete the requirements prescribed herein.

Article 14. Effectivity. The PNOG JV and Lease for Commercial Use Guidelines and any subsequent amendment or modification thereto, shall take effect within fifteen (15) calendar days from publication in a newspaper of general circulation and UP Law Center.